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No. 70-7

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~585~~

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent,

vs.

ALBERT SARNO AND CHRIS CARDI,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE ILLINOIS SUPREME COURT.

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THE ROTHSCHILD-MADISON PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

ILLINOIS CRIME INVESTIGATING COMMISSION,
Respondent,

vs.

ALBERT SARNO AND CHRIS CARDI,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE ILLINOIS SUPREME COURT.

Petitioners, Albert Sarno and Chris Cardi, respectfully pray that a writ of certiorari issue to reverse the judgment of the Illinois Supreme Court finding petitioners guilty of contempt.

OPINION BELOW.

The only opinion is that issued by the Illinois Supreme Court in Case No. 42422, which is included in the Appendix.

JURISDICTION.

1. Judgment was entered on May 27, 1970.

2. Rehearing was not requested. There was no order entered granting an extension of time within which to petition for certiorari.

3. The statutory provision conferring on this Court's jurisdiction to review the judgment is Title 28, Section 2101 (c) United States Code Annotated.

QUESTIONS PRESENTED.

1. Must the State affirmatively demonstrate to respondents, when testifying pursuant to the Illinois Immunity Statute, that an immunity, as broad in scope as the Fifth Amendment, is available and applicable to them?

2. Can a state legislative commission use records illegally seized from the home of a person by the police and previously ordered suppressed in a prior criminal case for the purpose of framing questions to that same person, pursuant to an immunity statute, without violating that person's rights under the Fourth, Fifth and Fourteenth Amendments with reference to future state prosecutions?

3. Assuming the immunity statute was not as broad as the Fifth Amendment, as far as future state prosecutions are concerned, may a person plead the Fifth Amendment when it is evident, from the implication of the questions in the setting in which they are asked, that responsive answers to the questions might be dangerous because injurious disclosure could result in future state prosecutions?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the Fourth Amendment, Fifth Amendment and the Fourteenth Amendment. The State of Illinois Immunity Statute, Chapter 38, Section 203-14, provides that:

> "In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman

or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. *After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence.* He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

STATEMENTS OF CASE.

Police officers entered the home of Chris Cardi, without a warrant, and seized certain records. From information obtained from these records, defendants, Chris Cardi and Albert Sarno, were indicted and tried in the Criminal Court of Cook County, Illinois.

That upon the trial of that indictment the court entered an order suppressing these records.

That either before or after these records were ordered suppressed, the Chicago Police Department and/or the State's Attorney of Cook County photostated these records and forwarded them to the Federal Government and the Illinois Crime Investigating Commission.

That the same records that had been previously suppressed were then used by the Illinois Crime Investigating Commission and formed the basis for the questions propounded to the defendants, Chris Cardi and Albert Sarno, at the hearings before the Commission.

Subsequently, the defendants were subpoenaed to appear before the Illinois Crime Investigating Commission that was investigating the "juice racket." On February 24, 1968, the defendants appeared before the Commission and invoked the Fifth Amendment to all of the questions asked (A. 2-11) and (A. 11-18). The records previously illegally seized from the home of Chris Cardi and ordered suppressed, formed the basis for the questions asked of each defendant.

The questions the defendants were directed to answer fall into certain categories, and it is readily apparent from the questions that the defendants were being questioned not because they had been a victim of the "juice racket," or because they had some independent information concerning the racket, but because they presumably had been and were then actively engaged in the racket and the State was interested in all their sources of income, their numerous business associations and details of the racket. The categories are as follows:

1. The present occupation of Chris Cardi and his occupation from 1963 to the present (A. 8) and of Albert Sarno (A. 11).

2. Was Cardi's occupation from 1963 to the present that of a juice collector or enforcer (A. 3), and what lines of gainful employment did Sarno have since he left the police department (A. 17), and was it not true that Cardi from 1963 to the present had made juice collections from over a hundred people.

3. Did Cardi file income tax returns for the years

1964, 1965 and 1966, and with which office (A. 5); did Sarno file income tax returns for the years of 1964, 1965 and 1966 (A. 17), and with what office (A. 18).

4. Cardi's association with Joseph Gagliano as a juice collector or other business (A. 3); whether Gagliano picks him up every morning (A. 5) and pays for his services as a collector; did Sarno make loans for Gagliano and also some without Gagliano (A. 13); and does Sarno take orders from Gagliano.

5. Similar questions of both defendants with reference to a certain man named Messino (A. 3, 4, 7, 13, 14, 15).

6. Cardi's association with Jackie "The Lackey" Cerone (A. 3), a business organization known as Yogi Bear Drive Inns, Leo Netzel (A. 4), Moons Sandwich Shop, Mr. Lucky's Tavern (A. 5), Chicago Linoleum and Tile Co., Stefano's Restaurant (A. 6), Bar Nazionale (A. 8), Albert Sarno, Fiore Buccieri, Vic Damone Pizza Company, Independent Factoring Company (A. 9) and Ray Finnerman (A. 10).

Sarno's association with Moons Sandwich Shop (A. 12), Red Steer Restaurant, Flying Carpet Motel, Sam and Sleepy's Tavern, Jack "The Lackey" Cerone (A. 15), Mike Cataldo (A. 16) and Joe Donzanelli (A. 17).

7. Cardi's negotiation or collection of juice loans from Mr. Boyd (A. 4), Joseph Gillespie, a person known as "Doc" (A. 6), Bruce Carman, Charles Tappert (A. 7), Mr. White (A. 8, 9) and Ray Finnerman (A. 10).

Sarno's negotiation or collection of juice loans from Mr. Black (A. 13), Mr. James (A. 14), Ed Bach (A. 15), Larry Greenbaum, Philip Marzarello, George and Pete Menenexis (A. 16) and Dave Wasserman (A. 17).

8. Some of the questions were confined to the City of Chicago or the suburbs—many others were asked without any reference as to whether the acts occurred in the State of Illinois or the time at which they occurred, including the following:

With reference to Cardi—Collections of $200 a week from Joseph Gillespie on a loan of $2,900; collections of $2,000 a week from a person known as "Doc" on a loan of $20,000 (A. 6); collections of $600 a month from Bruce Carman on a $7,300 loan; the lending of $7,000 to Charles Tabbert (A. 7); gainful occupation of Cardi from January 1, 1963 to date; the presence of Cardi when White made payments on a loan at the interest of 10% a week to Messino (A. 8); Cardi's association in a business venture with Sarno; Cardi's association in a business venture with Buccieri (A. 9); collection of a loan from a Ray Finnerman, and whether Finnerman left his home and went to Texas (A. 10).

With reference to Sarno—The arrest of Sarno by the F. B. I. on April 2, 1962, for theft from interstate shipments; whether Sarno made loans to various persons on behalf of Messino and Gagliano (A. 12); is Sarno still a juice collector for Messino and Gagliano; did Sarno threaten Mr. Black's mother when Mr. Black became delinquent in his loan (A. 13); did Sarno exhibit a pistol and wave it under the face of Mr. Black; did Sarno make a loan to a Mr. James, who previously testified that he had borrowed money at 8% per week; was Sarno present when Messino threatened Mr. James with a baseball bat (A. 14); the collection of $750 a month from Larry Greenbaum on a loan of $5,000; did Greenbaum skip town to avoid

the juice payments; the collection of $100 a week from Philip Marzarello on a $1,500 loan, and whether he escaped from the City to avoid making further juice payments; collection of $100 a week on principal and $100 on interest for 100 weeks from George and Peter Menenexis (A. 16); and the gainful employment of Sarno since he left the Chicago Police Department (A. 17).

On March 21, 1968, the Illinois Crime Investigating Commission filed a motion in the Circuit Court of Cook County (Miscellaneous Section) requesting (1) that defendants be released from all liability to be prosecuted or punished on account of any matter to which they shall testify before the Commission, and (2) moving the court for an order on the defendants to appear before the Commission and answer the questions that may be put to each of them. The court entered an order granting the request of the Commission. The defendants then reappeared and refused to answer the questions once again, invoking the Fifth Amendment. The Commission then filed a petition for a rule to show cause before the court and defendant's filed an answer to the petition alleging (1) that Chapter 38, Section 203-14 violates the self-incrimination clauses of the Illinois State and Federal Constitutions in that it makes no provisions for the "fruits of the poisonous tree" (A. 64), and (2) that answers to the questions propounded to the defendants would subject them to prosecution in this State.

On May 9, 1969, the Court entered an order finding defendants in contempt of court and sentenced them to a term of six (6) months in the county jail for failing to comply with the provisions of the order in violation of Chapter 38, Section 203-13 and 203-14, Illinois Revised Statutes, 1967.

The Respondents, Albert Sarno and Chris Cardi, raised

the issues when testifying before the Illinois Crime Investigating Commission when they invoked the Fifth Amendment to the questions being asked (A. 2-19). The attorney for the respondents raised the issue in the trial court by pleading that the Illinois Immunity Statute did not protect the respondents from the "fruits of the poisonous tree" (A. 28). The issues were raised in the Illinois Supreme Court under the following headings:

> "CHAPTER 38 SECTION 203-14 IS NOT AS BROAD IN SCOPE AS THE FIFTH AMENDMENT—IT CONTAINS AN EXCEPTION; DEFENDANTS' RIGHTS WERE PROTECTED, THEREFORE, BY THE FIFTH AMENDMENT, AND DEFENDANTS WERE ENTITLED TO A HEARING UNDER THE "PERFECTLY CLEAR" STANDARDS.
>
> THE STATE DID NOT AFFIRMATIVELY DEMONSTRATE TO THE DEFENDANTS THAT A VALID IMMUNITY FROM PROSECUTION FROM FEDERAL, STATE AND SISTER STATES WAS AVAILABLE AND APPLICABLE TO THEM.
>
> THE QUESTIONS ASKED OF THE DEFENDANTS BEFORE THE COMMISSION WERE TAINTED; THE INFORMATION UPON WHICH THE QUESTIONS WERE BASED WAS OBTAINED FROM PHOTOSTATS OF RECORDS THAT A COURT OF LAW HAD PREVIOUSLY SUPPRESSED."

ARGUMENT.

Fifth Amendment.

The respondents fear future prosecution under State law only. The Illinois Immunity Statute affords protection to the respondents only in that they "shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence." The immunity statute is not as broad as the Fifth Amendment. It makes no provision for the "fruits of the poisonous tree;" it is similar to the Federal Immunity Statute found violative of the respondents' rights under the Fifth Amendment in *Counselman* v. *Hitchcock*, 142 U. S. 547, 564, 586, where the court construing a Federal Immunity Statute, stated at page 564, that the statute:

> 1. "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. . ."
>
> 2. "could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. . ."

at page 586:

> 3. "affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

As to each question asked of the respondents, it was "evident from the implications of the question, in the setting in which it (was) asked, that a responsive answer

to the question or an explanation of why it (could not) be answered might be dangerous because injurious disclosure could result," *Malloy* v. *Hogan*, 378 U. S., 1, 14; *Hoffman* v. *United States*, 341 U. S., 486-487.

The Illinois Supreme Court's reliance on the case of *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U. S. 52, is misplaced. The *Murphy* case only holds that the Federal Government must be prohibited from making use of state-compelled testimony and its fruits. The *Murphy* case does not hold that a state is prohibited from using the fruits of state-compelled testimony under the state immunity statute in future state prosecutions. The *Murphy* case does not overrule the *Malloy* case, it is only a related subject.

Fourth Amendment

Certain records were illegally seized from the home of Chris Cardi by a police officer. Chris Cardi, as a result of the seizure of these records, was tried and indicted in the Criminal Court of Cook County. The records were ordered suppressed by the court in that case. The same records were photostated and turned over to the Illinois Crime Investigating Commission and formed the basis for the questions propounded to the respondents. The respondents at this time did not know that these records were being so used.

Respondents' petition to the Illinois Supreme Court set forth these facts, and the Illinois Supreme Court took the petition with respondents' briefs. Respondents' position was summarily dismissed by the Illinois Supreme Court on the following grounds:

> "That argument overlooks the fact that the Crime Commission hearings do not constitute criminal proceedings of any kind. Rather the Commission is an

arm of the legislature directed to investigate organized crime."

Records suppressed because of illegal seizure cannot be used for any purpose, *Silverthorn Lumber Co.* v. *United States*, 251 U. S., 385. The same decision was derived in the following cases:

Rogers v. *United States*, 97 F. 2d 691, First Circuit (1938), action to recover customs duties on liquors imported in to the United States;

Carlisle v. *State*, 276 Ala 436 (1965), bill in equity to abate a gambling license—police officers obtained evidence in illegal search;

Berkowitz v. *United States*, 340 F. 2d 168 C A 1 Mass 1965, libel for forfeiture of money intended for use in violation of revenue loss.

The State Did Not Affirmatively Demonstrate to the Respondents That a Valid Immunity From Future Prosecution Under State Law Was Available to Them.

The trial court entered an express order granting the respondents imunity. The Illinois Supreme Court held that the immunity statute did not authorize the circuit court to enter an express order granting immunity to the respondents. Illinois Supreme Court Opinion, page 15. At no time during the proceedings was it ever affirmatively demonstrated to the respondents that an immunity, as broad in scope as the Fifth Amendment, was available and applicable to them.

The Illinois Supreme Court, page 17, held that "The defendants demonstrated that they were well aware of the immunity available to them in their motion to dismiss the Commission's motion where they cited both Section 203-14 and the *Murphy* decision." However, the *Murphy*

decision protects the respondents only from future prosecution under federal law—the *Murphy* decision does not protect the respondents from further prosecution for the "fruits of the poisonous tree" under state law. Hence, the State did not meet its burden of affirmatively demonstrating to the respondents that an immunity as broad in scope as the Fifth Amendment was available and applicable to them.

> "A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating," *Stevens* v. *Marks*, 383 U. S. 234, 246.
>
> "It is common ground that petitioner cannot be jailed for refusing to incriminate himself unless either he waived his federal privilege against self-incrimination, or immunity adequate to offset that privilege was conferred upon him." *Stevens* v. *Marks*, 383 U. S. 234, 247.
>
> "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens* v. *Marks*, 383 U. S. 234, 246.
>
> "A declaration that there was a valid immunity uttered for the first time on appeal would come too late." *Stevens* v. *Marks*, 383 U. S. 234, 246.

CONCLUSION.

The Illinois Supreme Court was in error in holding that respondents' fear of further state prosecutions was controlled by *Murphy* v. *Waterfront Commission*, 378 U. S. 52—it should have found that the case was controlled by *Malloy* v. *Hogan*, 378 U. S. 1, and *Stevens* v. *Marks*, 383 U. S. 234. Further, in view of the growing number and various kinds of state immunity statutes, the United States Supreme Court should rule on the question of whether or

not legislative commissions can use records illegally seized by the police, and previously ordered suppressed in a criminal case, for the purpose of propounding questions to a witness from whose house the records were illegally seized.

Respectfully submitted,

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APPENDIX.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Docket No. 42422—Agenda 65—November, 1969.

ILLINOIS CRIME INVESTIGATING COMMISSION, Appellee, *vs.* ALBERT SARNO *et al.*, Appellants.

Mr. JUSTICE CREES delivered the opinion of the court:

On February 8, 1968, the circuit court of Cook County ordered the defendants to appear before the Illinois Crime Commission and answer questions put to them by the Commission which was then investigating "juice" rackets. The defendants appeared before the Commission but invoked the fifth amendment to all questions asked. On March 21, 1968 the Commission moved the circuit court to enter an order pursuant to section 14 of the Illinois Crime Investigating Commission Act (Ill. Rev. Stat. 1967, ch. 38, par. 203—14) releasing the defendants from all liability to be prosecuted for any testimony they might give before the Commission and compelling the defendants to appear before the Commission and answer such questions as may be put to them. On January 30, 1969, the circuit court granted the motion.

Pursuant to the court's order, defendants appeared before the Commission but again invoked the fifth amendment. On May 9, 1969 the court entered judgment finding defendants in contempt of court and sentenced them to a term of six months in jail.

Defendants appeal from the judgment finding them guilty of contempt of court on several grounds. The first is that the circuit court was without jurisdiction to grant an

express order of immunity under section 203—14 of the Illinois Crime Investigating Commission Act. Hence, the defendants argue, the entire order of the circuit court was void. While we agree that nowhere in section 203—14 is the circuit court given the express power to grant immunity to the defendants, we cannot agree that the order of the circuit court was void. The statute clearly gives the circuit court the power to compel the defendants to appear before the Commission and answer questions. The fact that the court also granted the defendants immunity would not deprive it of jurisdiction to order the defendants to appear before the Commission and answer its questions. By statute, immunity would attach as soon as the defendants would comply with the order and answer questions.

Defendants next argue that the immunity protection of section 203—14 is not as broad in scope as the fifth amendment of the United States constitution. Therefore, the defendants claim that they were justified in invoking the fifth amendment a second time before the Commission. Defendants rely on *Hoffman* v. *United States*, 341 U. S. 479, 95 L. Ed. 1118, 71 S. Ct. 814, in support of their contention. That case held a witness is protected by the fifth amendment from compelled testimony unless "• • • it is perfectly clear, from a careful consideration of all the circumstances in the case that the witness is mistaken, and that the answer cannot possibly have such tendency to incriminate". Defendants contrast this language with section 203—14 which reads:

> "The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

The defendants assert the "reasonably certain" standard in section 203—14 is narrower in scope than the "perfectly clear" standard in *Hoffman* v. *United States.* Fifth amendment rights being guaranteed by the Federal constitution, the construction placed upon these rights by the United States Supreme Court is the highest authority and is binding upon these defendants. By its decision in *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52, 12 L. Ed. 2d 678, 84 S. Ct. 1594, that court has made it perfectly clear that the full scope of fifth amendment protection is granted to any witness who is compelled to testify. In that case the court, being faced with the issue whether "* * * one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction", held that "* * * the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law * * *". L. Ed. 2d at pp. 680, 694.

We find no merit in defendants' third contention that the State did not affirmatively demonstrate to the defendants that immunity from prosecution was available to them. The Commission, in its motion to have the defendants answer questions put to them by the Commission, specifically mentioned section 203—14. That section grants immunity to the defendants from further prosecutions. That this immunity is co-extensive with the fifth amendment has been established by the holding of *Murphy* v. *Waterfront Commission.* The defendants demonstrated that they were well aware of the immunity available to them in their motion to dismiss the Commission's motion where they cited both section 203—14 and the *Murphy* decision.

The defendants' final argument is that because the information upon which some questions before the Commission

was based was obtained from records which a court had previously suppressed, the questions put to them were improper. That argument overlooks the fact that the Crime Commission hearings do not constitute criminal proceedings of any kind. Rather the Commission is an arm of the legislature directed to investigate organized crime. For these reasons the motion to remand for hearing, which was taken with the case, is denied.

JUDGMENT AFFIRMED.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.
County Department—Law Division.

ILLINOIS CRIME INVESTIGATING COMMISSION,
Petitioner,
vs.
ALBERT SARNO,
Respondent.

No. 66 L 1111.

Hon. EDWARD J. EGAN, Judge Presiding.

CONTEMPT ORDER.

This matter coming to be heard on the Motion For A Rule To Show Cause filed on behalf of the Petitioner by William J. Scott, Attorney General of the State of Illinois, the Court after issuing the requested Rule To Show Cause and after considering the record in this case and the arguments of counsel for both Petitioner and Respondent, and being now fully advised in the premises:

THE COURT DOTH FIND:

(1) That pursuant to the provisions of the Illinois Crime Investigating Commission Act, Illinois Revised Statutes 1967, Chapter 38, Section 203-14, the Illinois Crime Investigating Commission petitioned this honorable court for an order releasing the said Respondent, Albert Sarno, from all liability to be prosecuted or punished on account of any matter to which he shall testify in the matter

identified above before the said Commission, an further requiring the said Respondent, Alber Sarno, to be and appear before said Commissio and then and there answer such questions as migh be propounded to him.

(2) That on January 30, 1969, this Court entered a order directed to the said Respondent in accord ance with the prayer of the petition herein whic Order has been filed of record in this case, and b this reference thereto hereby made a part of thi Contempt Order as though fully setforth herein

(3) That this Order further provided that the sai Respondent should appear before the said Com mission on such date or dates and at such plac or places as the Commission may direct, provide that at least five days written notice be serve upon Respondent's attorney. That in accordanc within the terms of said order the Petitioner di on February 6, 1969, serve notice upon Respond ent, Albert Sarno, by letter properly addressed t the Respondent and his attorney, directing th Respondent to be and appear before the Illinoi Crime Investigating Commission on February 2 1969, at 118 North Clark Street, Room 535, Count Building, Chicago, Illinois.

(4) That on February 28, 1969, Respondent, Alber Sarno, appeared with Attorney Frank Whalen a the place and time specified.

(5) That at the public hearing convened that dat Respondent, Albert Sarno, having stated his nam and address, was asked each of the questions re ferred to in the order of January 30, 1969. Despit a direction by the Co-Chairman of the Commis sion ordering him to answer each such questio

Respondent, Albert Sarno, refused to answer each and every question propounded.

(6) That the above named Respondent, Albert Sarno, has wholly failed and neglected to comply with the provision of the Order heretofore entered.

(7) That the failure of the above named Respondent, Albert Sarno, to comply with the provisions of the Order heretofore entered constitutes contempt of this Court as defined in the Illinois Revised Statutes, 1967, Chapter 38, Sections 203-13 and 203-14.

(8) That all pleadings and exhibits filed in this case are hereby incorporated into this Contempt Order as though fully setforth herein.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That Albert Sarno is guilty of wilful contempt of this Court.
2. It is further ordered that Albert Sarno shall be committed to the County Jail for a period of six (6) months.
3. It is further ordered that the Clerk of the Circuit Court of Cook County shall issue a mittimus directing that the Respondent, Albert Sarno, be taken into custody by the Sheriff and committed to the County Jail.

ENTER: /s/ EDWARD J. EGAN
Judge

The same Contempt Order was entered as to Respondent, Chris Cardi.

Supr

ALBERT

ILLINOIS

(On

JAMES A. CAMP

Attorney General

Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 565

ALBERT SARNO and CHRIS CARDI,

Petitioners,

vs.

ILLINOIS CRIME INVESTIGATING COMMISSION,

Respondent.

(On Petition For Writ of Certiorari To the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 45 Ill. 2d 473 (1970).

JURISDICTION

Petitioner designates Title 28 U.S.C. Section 2101 (c) as conferring jurisdiction on the Court to review the judgment in the instant case. This section provides a ninety-day time period within which a petition for writ of

certiorari may be filed to bring any judgment or decree in a civil action before the Court for review. Petitioner more properly may predicate jurisdiction on Title 28 U.S.C. Section 1257 (3) providing for review by writ of certiorari of the final decision of the highest court of a state where the validity of a state statute is drawn into question as being repugnant to the Constitution of the United States or where any privilege or immunity is claimed under the Constitution of the United States and Rule 22 (1) of the Rules of the Supreme Court of the United States—a designation in which Respondent herein concurs as to petitioners' first and third arguments.

This Court is without jurisdiction to review petitioners' second argument, however. The allegation that questions propounded to Sarno and Cardi by the Illinois Crime Commission were based upon evidence which a court had previously suppressed was never raised at the trial level either on the motion for entry of the immunity order or on the motion for the entry of the contempt order. *Quicksall* v. *Michigan,* 339 U.S. 660 (1950). Nor was the Fourth Amendment designated in the jurisdictional statement of petitioners' brief in the Supreme Court of Illinois, *Michigan Sugar Co.* v. *Michigan,* 185 U.S. 112 (1902); *Dewey* v. *Des Moines Iowa,* 173 U.S. 193 (1899), although reference was made to the Fourth Amendment in the body of the brief during petitioners' discussion of the evidence upon which the propounded questions were based. *Chicago R. Co.* v. *McGuire,* 196 U.S. 128 (1905). The Supreme Court in its opinion, while referring to this allegation in petitioners' brief, never directly ruled on the constitutional question which petitioners now seek to present. *Forbes* v. *Virginia State Council,* 216 U.S. 396 (1910). In their brief in this Court, Sarno and Cardi cite no reference to

the record in this case to support their bare allegation that the Commission questions were based upon inadmissible evidence. Indeed, petitioners even fail to cite the initial proceedings in which the evidence was alleged to have been suppressed. Consequently, this Court is without jurisdiction to consider the point. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Edelman* v. *California*, 344 U.S. 357 (1953); *Spies* v. *Illinois*, 123 U.S. 131 (1887).

QUESTIONS PRESENTED

1. Whether the immunity granted to petitioner was coextensive with the Fifth Amendment privilege against compulsory self-incrimination.

2. Whether the use by a legislative commission of evidence previously ruled inadmissible in judicial proceedings as the basis for questions propounded to petitioners during a hearing to which complete immunity from prosecution had attached violates the constitutional prohibition of unreasonable searches and seizures.

3. Whether the State affirmatively demonstrated to petitioners that the proffered grant of immunity from prosecution was as broad in scope as the Fifth Amendment privilege against self-incrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The statutory provision involved is Ill. Rev. Stat. (1965), Ch. 38, § 203-14, which provides:

"In any examination by or hearing before the Commission, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the Chairman or the Executive Director, in writing, requests a circuit court of the State to order that person to answer the question or produce the evidence, the court shall so order unless it finds that to do so would be contrary to the public interest, and that person shall comply with the order. After complying, and if, but for this Section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. He may, nevertheless, be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. The court shall not order any such person to testify or produce evidence if it reasonably appears to the court that such testimony or evidence, documentary or otherwise, would subject such witness to an indictment, information or prosecution (except for perjury committed in the giving of such testimony or the producing of such evidence) under the laws of another State or of the United States."

STATEMENT OF THE CASE

The Circuit Court of Cook County on February 8, 1968, ordered petitioners Sarno and Cardi to appear and answer questions before the Illinois Crime Investigating Commission, which was then investigating the "juice" rackets. (A. 1). On February 24, 1968, petitioners appeared before the Commission and invoked the Fifth Amendment

privilege against self-incrimination in response to each of the questions put to them. (A. 2-18).

Upon motion by the Commission, the Circuit Court entered an order pursuant to Ill. Rev. Stat. (1965), Ch. 38, § 203-14[1] directing the petitioners to appear before the Commission and answer questions. The order also provided that immunity would attach to the answers given by petitioners to the Commission questions, excepting the offenses of perjury and contempt of court from the grant of immunity. (A. 32).

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Cardi and Sarno reappeared before the Commission on February 28, 1969, and again refused to answer all questions put to them, invoking the Fifth Amendment. (A. 32-61). Following the filing by the Commission of a petition for rule to show cause and the petitioners' answer, the Circuit Court on May 9, 1969, entered an order finding petitioners in contempt of court and sentencing them to a term of six months in the County Jail for failure to comply with the provisions of the original order requiring them to appear and answer questions before the Commission. (A. 68).

Upon appeal to the Supreme Court of Illinois, the contempt order was affirmed. Petitioners then filed the instant Petition for a Writ of Certiorari to the Supreme Court of Illinois.

REASONS FOR DENYING THE WRIT

I.

THE IMMUNITY GRANTED TO PETITIONERS WAS AS BROAD IN SCOPE AS THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Petitioners fear future prosecution by the State should they appear before the Illinois Crime Commission and answer the questions put to them. They reason that their answers might provide leads to evidence previously unknown to State authorities which might form the basis of a future prosecution. Characterizing such evidence as the "fruits of the poisonous tree", petitioners argue that the grant of immunity provided by the Illinois Crime Commission statute is not coextensive with the Fifth Amendment privilege to be free from compulsory self-incrimina-

tion, and therefore, their refusal to answer based upon their Fifth Amendment privilege was justified. Such an argument ignores the holdings of two decisions of this Court—*Malloy* v. *Hogan*, 378 U.S. 1 (1964) and *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964)—and the very essence of the Fifth Amendment privilege.

In *Malloy* v. *Hogan, supra*, this Court held the Fifth Amendment privilege against self-incrimination to be applicable to the States through the Fourteenth Amendment. With this holding as a basis, the Court went on to consider a related issue in *Murphy* v. *Waterfront Commission of New York Harbor, supra.*—whether a state witness granted immunity under state law may be compelled to testify if that testimony then may be the basis of a criminal prosecution by another jurisdiction. Since a grant of immunity to be valid must be coextensive with the scope of the privilege against self-incrimination, *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), the Court in *Murphy* undertook to delimit the scope of the Fifth Amendment privilege. After discussing the history, policies and purposes of the privilege, the Court held "that the Constitutional privilege against self-incrimination protects a state witness against incrimination under federal *as well as state law* and a federal witness against incrimination under state as well as federal law." (Emphasis added)

Disregarding the explicit language of this holding, petitioners herein argue—not that they fear prosecution by another jurisdiction after being granted immunity by Illinois—but that the very jurisdiction which immunized them from prosecution will later, in effect, retract this grant and initiate criminal proceedings. Such a theory ignores the rationale and language of *Murphy* and the

requirements of *Malloy*.[2] In *Murphy*, the Court, both by its explicit holding and its discussion of *Adams* v. *Maryland*, 347 U.S. 179 (1954), authoritatively disposed of petitioners' argument here. Referring to *Adams*, the Court quoted: "' a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. 347 U.S. at 181.'"[3] While *Adams* dealt with a state prosecution following a federal grant of immunity, the Court in *Murphy* continued: "This statement suggests that any testimony elicited under threat of contempt by a government to whom the constitutional privilege against self-incrimination is applicable • • • may not constitutionally be admitted into evidence against him in any criminal trial conducted by a government to whom the privilege is also applicable."[4]

Since the privilege is applicable both to the states and the federal government and since a grant of immunity to be valid must be coextensive with the privilege, a state witness [such as petitioners Cardi or Sarno] granted immunity by the state is protected from self-incrimination under both state and federal law. Therefore, petitioners Sarno and Cardi improperly refused to answer questions put to them by the Illinois Crime Investigating Commis-

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2. The holding in Malloy made the standards used to delineate the federal privilege applicable to the states. 378 U.S. at 11. Adopting the holding of Counselman v. Hitchcock, supra, in Murphy, the Court found those standards to be that incriminating testimony may not be compelled unless the testimony and its fruits cannot be used in any manner in connection with a criminal prosecution.

3. 378 U.S. at 75.

4. Id. at 75-76.

sion and were properly held in contempt by the Circuit Court of Cook County.

II.

USE OF EVIDENCE PREVIOUSLY RULED INADMISSIBLE BY A COURT TO FORMULATE QUESTIONS PROPOUNDED TO PETITIONERS BY A LEGISLATIVE COMMISSION IN A PROCEEDING TO WHICH COMPLETE IMMUNITY FROM PROSECUTION HAS ATTACHED DOES NOT VIOLATE THE FOURTH AMENDMENT PROVISION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

Petitioners assert that the Commission violated the Fourth Amendment prohibition of unreasonable searches and seizures by utilizing evidence which a court had previously suppressed to formulate questions to be propounded to Sarno and Cardi during the investigation of the "juice rackets" in Illinois. They cite no authority or record references to support their bald allegations either that the questioned evidence had been suppressed previously by a court, or, if previously held inadmissible, that the evidence did in fact form the basis for questions propounded to petitioners by the Commission. See Jurisdictional Statement. Even assuming both of these allegations were established, however, the circumstances of this case do not reflect any violation of the Fourth Amendment.

The Illinois Crime Investigating Commission was created by the Illinois legislature to investigate organized crime and to evaluate the extent to which organized crime exists

within the borders of the State of Illinois.[5] The enabling legislation also provides for the collection and dissemination of such information to aid the state in protecting and preserving the public welfare and safety of its citizenry. The members of the Commission are appointed by the legislature and the Governor,[6] with the Commission se-

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5. Ill. Rev. Stat (1963), Ch. 38, § 203-1 provides:

"It is the intent of the General Assembly, recognizing the frequent subversion of governmental, political and economic institutions through the influence of organized crime, (a) to set up adequate facilities for investigating and establishing the facts and general background relating to organized crime and to individual crimes insofar as they have a bearing on organized crime, whether the act or intent constituting the same, or both, occurs within or without the State so long as such organized crime or individual crimes affect the public safety, public peace, public health, public morals, public welfare or public justice of the State; (b) to evaluate the extent to which organized crime exists within the borders of the State and the degree of efficiency of law enforcement agencies in dealing with it; and (c) to make such facts, general background and evaluation available to the legislative, executive, judicial and administrative bodies and officials of the State, to the end that they may better perform their respective functions in preserving the public safety, public peace, public health, public morals, public welfare and public justice of the State.

This Act, and the jurisdiction of the Commission created thereby, is not intended to be in derogation of the jurisdiction of any Grand Jury of any County of the State."

6. Ill. Rev. Stat. (1963), Ch. 38, § 203-3.

lecting its own chairman. Thus, as the Supreme Court of Illinois recognized in its opinion in this case: ". . . The Crime Commission hearings do not constitute criminal proceedings of any kind. Rather, the Commision is an arm of the legislature directed to investigate organized crime."[7]

In support of their argument, petitioners rely on *Silverthorn Lumber Company* v. *United States*, 251 U.S. 385 (1920). *Silverthorn* does not control the instant case. While petitioners cite the decision for the broad proposition that "records suppressed because of illegal seizure cannot be used for any purpose"[8], the Court was speaking to a situation in which the federal government had seized illegally certain business records. After gaining knowledge of their existence through the seizure and after returning the documents to the owner, the government then sought their production by the owners through the use of subpoenas. In reversing the imposition of punishment for failure to comply with the subpoenas, the Court stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong *cannot be used by it in the way proposed.*"[9] (Emphasis added)

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7. Pet's. Br. 18.

8. Pet.'s Br. 11.

9. 251 U.S. at 392.

Thus, in *Silverthorn* (and the three lower court decisions cited by petitioner as reaching the same conclusion)[10], a person, through the use of judicial proceedings, was required to suffer a penalty or forfeiture based upon evidence illegally seized. The decision prohibiting the use of such evidence for those purposes in no way governs the instant case.

The hearings conducted by the Commission are not judicial proceedings. The Commission is a creature of the legislature designed to collect and collate data on organized crime. It is not empowered to prosecute or impose penalties. In the particular situation of the instant case, petitioners were subjected to no penalties or risks of future prosecution through the use of the inadmissible evidence in formulating questions. The evidence had been suppressed by a court, and therefore could not be used in a criminal proceeding against petitioners. The answers to any questions put to petitioners during the hearings were protected by the Fifth Amendment privilege against self-incrimination and the coextensive grant of immunity which would prevent the use of either the petitioners' testimony or its fruits in any subsequent criminal proceeding.[11] Thus, petitioners were subject to no liability through the use of the questioned evidence in a proceeding conducted by a legislative commission. The petitioners have cited no authority, and indeed there is none, to prohibit the use of such evidence in this circumstance.

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10. Rogers v. United States, 97 F. 2d 691 (1st Cir. 1938); Carlisle v. State, 276 Ala. 436 (1965); Berkowitz v. United States, 340 F. 2d 168 (1st Cir. 1965).

11. See Section I of the instant Brief.

III.

THE STATE AFFIRMATIVELY DEMONSTRATED, AND INDEED PETITIONERS WERE WELL AWARE OF THE VALID IMMUNITY FROM STATE PROSECUTION AVAILABLE TO THEM.

For their final argument, petitioners allege that the State did not affirmatively demonstrate the availability of a valid immunity from future state prosecution. This argument is clearly rebutted by the record, which reflects both the affirmative demonstration by the State of an immunity coextensive with the Fifth Amendment privilege against self-incrimination and the recognition by petitioners of that immunity.

Contained in the motion by the Commission, filed March 21, 1968, requesting the entry of an order pursuant to Ill. Rev. Stat. (1963), Ch. 38, § 203-14 granting to petitioners immunity from prosecution was the following language:

> "The motion moves the court to enter an order . . . releasing the said Chris Cardi and the said Albert Sarno *from all liability to be prosecuted or punished* on account of any matter to which he shall testify in the matter identified above before the said Commission, except for perjury or contempt of court. . . ."[12]

In petitioners' motion to dismiss or in the alternative to strike, petitioners demonstrated their clear understanding of the State's effort to grant immunity and of the relevant case law governing such grants. Throughout their motion, petitioners repeatedly refer both to the statutory

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12. A. 18-19.

immunity provision and to this Court's decision in *Murphy*.[13]

These proceedings occurred four years after the decisions in *Malloy* and *Murphy*. The State of Illinois made clear that the grant of immunity protected Sarno and Cardi from all liability to be prosecuted or punished. Petitioners themselves demonstrated their awareness of the decision in *Murphy* and its decisiveness of the issue. In this situation, the State can be required to do no more. Indeed, Illinois met its burden by affirmatively demonstrating a valid immunity from prosecution to petitioners. Should Sarno and Cardi choose to ignore or misinterpret the grant of immunity, they must suffer the consequences—in this case, a citation for contempt of court.

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13. A. 19-24.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition For Writ of Certiorari in the instant case be denied.

Respectfully submitted,

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